Filed 3/23/09 In re M.V. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. M.V., Defendant and Appellant.	B208478 (Los Angeles County Super. Ct. No. FJ40082)

APPEAL from an order of the Superior Court of Los Angeles County. Robin Miller-Sloan, Judge. The order is affirmed.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Catherine Okawa Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

M.V. (appellant) appeals from the order continuing him a ward of the court (Welf. & Inst. Code, § 602) upon a finding that he committed misdemeanor battery on the mother of his child. (Pen. Code, § 243, subd. (e)(1).) He was continued home on probation. The juvenile court set a maximum period of confinement of three years, four months, aggregating the confinement time on this petition and a prior sustained petition alleging that appellant made a criminal threat in violation of Penal Code section 422.

Appellant contends that the evidence was insufficient to support the finding that he committed battery because there was no evidence he acted intentionally. Appellant further contends, and respondent concedes, that the juvenile court lacked the discretion to set a maximum period of confinement because appellant was placed home on probation. We strike the maximum period of confinement and otherwise affirm the order under review.

FACTS

We view the evidence in accordance with the usual rules of appellate review. (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.) On April 28, 2008, appellant approached E.B., his former girlfriend, as she walked on a Los Angeles street with her mother, her two siblings, and her four-month-old son. E.B. had been appellant's girlfriend for almost two years, but they had broken up in early April. Appellant was the baby's father.

Appellant appeared to be drunk, and when he screamed out E.B.'s name, she ignored him. Appellant said, "Give me the baby. Let me see him." E.B. continued to ignore him. She did not want to give him the baby, fearing appellant might fall with the child.

Appellant called E.B. a "bitch" and a "whore" and otherwise "disrespect[ed]" her. He told E.B. that he was going to take the baby away from her if she did not give the child to him, and he pushed her with his elbow. The prosecutor stated, "The witness is taking her right arm in a bended position with the elbow and moving it in a motion away from her body with her forearm." E.B. described appellant's action as follows: " I guess

he tried, like, doing, like, moving it or something, and he pushed me when he moved his elbow." When asked if appellant pushed her, she replied, "Yes." She stated that he "moved himself like that" during the time he was trying to take the baby. During cross-examination, she was asked whether the motion was consistent "with an accident when he was trying to grab the baby." She replied, "Probably yeah, because I don't think he was doing it on purpose either." E.B. was not hurt by appellant's push.

E.B.'s mother got between E.B. and appellant, argued with appellant, and finally threw her ice cream at him. Appellant laughed and moved the mother's hand away from him.

E.B. called the police because she was concerned about her safety and that of her child. She testified that when appellant was drunk, he "always [did] dumb things."

Appellant presented no evidence.

DISCUSSION

I. Substantial evidence supports the juvenile court's finding.

Appellant contends that the finding that he committed battery must be reversed because the prosecution failed to prove that he acted intentionally when he tried to grab the baby. This claim is without merit.

The governing principles are set forth in *People v. Hayes* (2006) 142 Cal.App.4th 175 (*Hayes*), where the issue before Division Six of this Court, similar to the issue raised here, was whether the defendant had the requisite mental state to support a conviction of battery.

The *Hayes* court explained: "The mental state required for battery is the same as that required for assault. 'An assault is an incipient or inchoate battery; a battery is a consummated assault. "An assault is a necessary element of battery, and it is impossible to commit battery without assaulting the victim." [Citations.]' (*People v. Colantuono* (1994) 7 Cal.4th 206, 216-217.) In *People v. Williams* (2001) 26 Cal.4th 779, our Supreme Court clarified the mental state required for assault. The court held as follows: '[W]e hold that assault does not require a specific intent to cause injury or a subjective

awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.' (*Id*., at p. 790.) The court noted that '"the test of natural and probable consequences is an objective one" [citation] . . . .' (*Ibid*.) Thus, 'a defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery.' (*Id*., at p. 788, fn. 3.)" (*Hayes, supra,* 142 Cal.App.4th at p. 180.)

The evidence thus establishes that appellant committed an assault. A rational trier of fact could conclude that appellant, while intentionally grabbing for the baby, had actual knowledge of facts sufficient to establish that this act would probably and directly result in the application of physical force against E.B., who was holding the child. (*Hayes, supra,* 142 Cal.App.4th at p. 180.) This constitutes substantial evidence that appellant committed the offense alleged, whether or not he believed his act was likely to result in a battery upon E.B. (*Ibid*.)

II. The maximum period of confinement must be stricken.

Where a minor is removed from the physical custody of his parent, the juvenile court is to specify a maximum period of confinement. (Welf. & Inst. Code, § 726, subd. (c).) However, where, as here, the minor is not removed from the physical custody of his parent, the statute does not empower a court to set a maximum period of confinement. As the parties agree, the three year, four month maximum period of confinement specified by the juvenile court must be stricken. (*In re Matthew A., supra,* 165 Cal.App.4th at p. 541.)

DISPOSITION

The three year, four month maximum period of confinement is stricken. In all other respects, the order under review is affirmed.

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_____, P. J.

BOREN

We concur:

_____, J.

DOI TODD

_____, J.

CHAVEZ